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No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a remainderman's disclaimers of portions of his interest in a testamentary trust were transfers subject to the federal gift tax where the disclaimers were executed approximately 33 years after the establishment of the trust, and 24 years after the remainderman attained his majority.

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OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A7–A19) is reported at 70 T.C. 430. The opinion of the court of appeals (Pet. App. A1–A6) is reported at 638 F.2d 93.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on February 18, 1981. The petition for a writ of certiorari was filed on March 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 2. The relevant provisions of Section 25.2511–1(c) of the Treasury Regulations on Gift Tax (1954 Code) (26 C.F.R.) are set forth at Pet. App. A30–A31.

STATEMENT

Margaret Weyerhaeuser Jewett, the grandmother of petitioner George F. Jewett, Jr., died testate on January 14, 1939, a resident of Falmouth, Massachusetts. Her will was admitted to probate. Clause Eighth of her will created a trust for the benefit of the testatrix's husband, James R. Jewett, during his life, and thereafter for the benefit of her son, George F. Jewett, and his wife, Mary Cooper Jewett (now Mary C. Gaiser) for their lives. The trust, established under the will of a Massachusetts decedent, has a situs in Massachusetts (Pet. App. A8).

Mary C. Gaiser, the mother of petitioner, is the sole surviving life beneficiary of the trust. She was born on March 7, 1901. Petitioner was born on April 10, 1927 (Pet. App. A8–A9).

Following the death of the surviving life beneficiary, the will provided for distribution of the trust remainder in equal shares to the children of George F. Jewett then living. Petitioner would be entitled to a share of the trust remainder if he survived his mother. If petitioner failed to survive his mother, the share to which he would have been entitled if he had survived would pass to his issue by right of representation (Pet. App. A9).

On August 30, 1972, petitioner executed an instrument entitled "Estate of Margaret Weyerhaeuser Jewett/George F. Jewett, Jr. Disclaimer" (Pet. App.

A9). The instrument provided in part (Pet. App. A9–A10):

> WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and
>
> WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and
>
> WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and
>
> WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and
>
> WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).
>
> NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent

(50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

On December 14, 1972, petitioner executed an instrument, in the same form as the document he executed on August 30, 1972, by which he disclaimed his remaining 5 percent interest in his share of the trust remainder (Pet. App. A10).

The value of the entire trust corpus was $7,912,393.63 on August 30, 1972, and $8,398,038.37 on December 14, 1972 (Pet. App. A10).

Petitioner filed gift tax returns for the calendar quarters ending September 30, 1972, and December 31, 1972, in which he notified the Commissioner of Internal Revenue of his execution of the disclaimers, but did not report as gifts any amount with respect to his interest in the trust.[1] On audit, the Commissioner determined that petitioner's disclaimers were transfers subject to the gift tax, and determined deficiencies of approximately $750,000. In this action brought by petitioner in the Tax Court for a redetermination of the deficiencies, the Tax Court held that petitioner's disclaimers of his one-half interest in the trust remainder, which were not made until 33 years after the trust was created and 24 years after he reached his majority, were not made within a reasonable time after he learned of the bequest, as required by Treasury Regulations on Gift Tax (1954 Code) (26 C.F.R.), Section 25.2511–1(c). The court accordingly ruled that petitioner's disclaimers

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[1] Petitioner's wife, Lucille M. Jewett, elected to consent to treat the gifts as made by both her and her husband under Section 2513 of the Code and the gift tax returns were filed accordingly (Pet. App. A8).

were taxable gifts under Sections 2501(a) and 2511(a) of the Code (Pet. App. A11–A18).

The court of appeals affirmed, with one judge dissenting. It held that under Section 25.2511–1(c) of the Treasury Regulations, a disclaimer must be made within a reasonable time after a contingent remainderman learns of the creation of his interest. Since petitioner disclaimed his remainder interest in his grandmother's trust approximately 33 years after having learned of the creation of the interest, the court concluded that even though the disclaimers were valid and timely under Massachusetts law (Pet. App. A3), they were not made within a reasonable period of time, and therefore were taxable gifts (Pet. App. A5). In so ruling, the court acknowledged that its determination of a reasonable time for disclaiming interests for federal gift tax purposes conflicted with *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), which held that state law was determinative of the question whether a disclaimer was made within a reasonable time under Section 25.2511–1(c) of the Regulations.

DISCUSSION

1. The court of appeals correctly held that petitioner's disclaimers were gifts subject to the gift tax under Sections 2501 and 2511 of the Code.

Sections 2501(a) and 2511(a) of the Code impose a tax upon "the transfer of property by gift," whether the transfer is in trust or otherwise, and whether the gift is "direct or indirect." Congress intended that the term "property" in this provision be used in its "broadest sense * * * reaching every species of right or interest protected by law and having an exchangeable value." It also intended to use the term "indirect" in the "broadest and most comprehensive sense," and to tax "all transactions * * * whereby, and to the extent

* * * that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H.R. Rep. No. 708, 72d Cong., 1st Sess. 27–28 (1932); *Robinette* v. *Helvering*, 318 U.S. 184, 187 n.2 (1943).

Section 25.2511–1(c) of the Treasury Regulations provides a narrow exception to this broad rule. It states in pertinent part that—

> * * * a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * *

The Regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be made within a reasonable time after a person learns of his rights to the property; second, the disclaimer must be unqualified, unequivocal, and effective under local law.[2]

Under this Regulation, petitioner's disclaimers were not made within a reasonable time after he learned of the existence of his remainder interest in his grandmother's trust. As the Tax Court found, petitioner did not disclaim his interest within a reasonable period of time because he waited 24 years after he attained his majority. The court of appeals found that petitioner's

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[2] It is undisputed that petitioner's disclaimers were effective under Massachusetts law (Pet. App. A3).

disclaimer—made 33 years after the creation of his interest—was not made within a reasonable period of time. On either basis, petitioner's disclaimer was not timely under the Regulation.

As the court of appeals noted (Pet. App. A5), the purpose of the Regulation is to determine whether a disclaimer, valid under state law, is nevertheless taxable as a gift. It is therefore not sufficient that a disclaimer meets all the requirements of state law, including timeliness. To qualify as a nontaxable transfer for federal gift tax purposes, a disclaimer must also satisfy a federal timeliness requirement. The reasonable time requirement of the Regulation is separate and distinct from the timeliness standard under state law.

This difference between state and federal timeliness requirements is appropriate because of the different concerns of state law and federal gift tax law. As the Tax Court explained (Pet. App. A16–A17):

> The Federal gift tax is concerned with control over the disposition of property and with exercises of the right to determine who should enjoy the fruits of ownership of property. * * * State law, by contrast, may respond to concerns such as the balancing of conflicting claims to property * * * and the protection of the rights of creditors and other third parties * * *. While a State court might be willing to accept a renunciation of nonpossessory interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the property, or whether he had better let it pass directly to the next generation.

Thus, even though petitioner's disclaimers were timely under state law, the time lag of 33 years after learning of the transfer in trust and 24 years after attaining his

majority was not a reasonable time for petitioner to disclaim his interest under Section 25.2511–1(c). The disclaimers were thus gifts subject to tax under Sections 2511 and 2501.

2. In reaching its conclusion, the court of appeals acknowledged (Pet. App. A4) that its determination of when the "reasonable time" period for disclaiming under Section 25.2511–1(c) commenced conflicted with *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir 1973).[3] There, the court ruled that because Section 25.2511–1(c) does not specify what is a "reasonable time," the federal courts must look to state law in making this determination (480 F.2d at 61). The court held that under prevailing common law, and, in particular, Minnesota law,[4] the holder of a vested remainder interest subject to divestment is allowed a reasonable time to disclaim the interest after the death of the life beneficiary, and that a disclaimer within six months is considered to be made within a reasonable time (480 F.2d at 64).

Although the court below agreed (Pet. App. A4) with the Eighth Circuit as to the general rule of timeliness of a disclaimer under state law, it concluded that state law timeliness "relates only to the validity and effectiveness of the disclaimer" (Pet. App. A5). The federal gift tax

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[3]The holding in *Keinath* was reaffirmed by the Eighth Circuit in its en banc decision in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (1980). There, the court followed *Keinath* in a case involving the holder of a contingent remainder interest who also had a general power of appointment with respect to the interest. Three dissenting judges thought that *Keinath* was distinguishable because the disclaimant held extensive and ultimate control over the remainder interest through the general power of appointment (628 F.2d at 1132).

[4]Petitioner points out (Pet. 7–8) that the law in 27 states is similar to that in Minnesota.

statute, on the other hand, is concerned with the determination of those transfers Congress intended to subject to gift tax. Under state law a "transfer" to a contingent remainderman may not occur until it is indefeasibily vested. The federal gift tax statutes, however, do not require such vesting before a tax is imposed. Indeed, as the Tax Court noted (Pet. App. A14–15), if petitioner had assigned his interest in the trust without consideration, the transfer would have been subject to the gift tax. *Commissioner* v. *Procter*, 142 F.2d 824, 826–927 (4th Cir.), cert. denied, 323 U.S. 756 (1944). Moreover, the Tax Court properly emphasized (Pet App. A16) that the federal gift tax is concerned with control over the disposition of property, and the exercise of the right to determine who should enjoy property. Here, there can be no doubt that petitioner had such control and exercised such a right, for by disclaiming his remainder interest in his grandmother's trust, he transferred his interest in the trust to his issue.

3. Petitioner also argues (Pet 10–11) that the court of appeals ignored prior law permitting a disclaimer without incurring gift tax liability, as long as the disclaimer was effective and timely under state law. *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir. 1933), cert. denied, 290 U.S. 641 (1933); *Commissioner* v. *Vease's Estate*, 314 F.2d 79 (9th Cir. 1963). But those decisions did not establish the principle for which petitioner cites them. Both cases involved estate tax provisions, and did not present the specific gift tax issue raised here. At a minimum, the Commissioner's position in *Brown* v. *Routzahn* gave notice to potential disclaimants that he would advance the position asserted in this case, *i.e.*, that what is considered a reasonable time for disclaiming an interest under state law is not conclusive for federal estate tax, or, by implication, gift tax, pur-

poses.[5] Further, any reliance on *Brown* v. *Routzahn* in *Commissioner* v. *Vease's Esate* was dictum, because that case did not turn on the timeliness of a disclaimer.

Moreover, petitioner argues (Pet. 12–13) that the decision below confuses a disclaimer with a voluntary transfer. As petitioner views the matter, because a disclaimant cannot select the persons who will receive the property as a result of a disclaimer, the disclaimant has insufficient control over the property to subject the transfer to gift tax. In support of his position, petitioner again cites *Commissioner* v. *Vease's Estate*, *supra*, in which a decedent's estate contended that the property in certain trusts, in which the decedent had a life interest, was not includible in her gross estate under Section 811(c) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), the predecessor of Section 2036 and 2037 of the Internal Revenue Code of 1954. In *Vease's Estate*, the estate's theory was that the creation of the trusts was not a "transfer" by the decedent, and that the trusts were established pursuant to the settlement of a controversy regarding her father's will. The estate argued that the decedent renounced her interest under her father's will, and, consequently, never received any property that she could transfer. In deciding that there

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[5] To the extent petitioner argues (Pet. 11) that the application of Section 25.2511–1(c) is unreasonable or arbitrary, it should be noted that he waited some 14 years after the Regulation was adopted before disclaiming his interest. Moreover, the Commissioner's position here is consistent with the provisions in prior Regulations in effect at the time petitioner reached the age of majority. Section 86.2 of Treas. Reg. 108 (1939 Code), provided in pertinent part:

> Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interest are gratuitously passed or conferred upon another, *regardless of the means or device employed*, constitute gifts subject to tax. * * * [Emphasis added.]

had been no renunciation, the court reasoned that in negotiating the settlement agreement, the decedent had directed property to persons other than those who would have taken under her father's will had she disclaimed. But, as we have noted (*supra*, page 10), nothing in *Vease's Estate* other than dictum lends support to petitioner's contention that a disclaimer will not be subject to gift tax under Section 25.2511–1(c) as long as the disclaimant does not select the recipients of property. Indeed, if petitioner were correct, any disclaimer, no matter how untimely, would not constitute a taxable gift.

Finally, petitioner contends (Pet. 14–15) that the decision below is inconsistent with Congress' intent that the gift tax complement the estate tax. In support of this argument, petitioner relies upon the statement in *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939),[6] that the gift tax serves to supplement the estate tax, and that the two are in pari materia and must be construed together. He therefore argues (Pet. 15) that since a contingent interest (conditioned on survival) would not be subject to estate tax, its transfer should never be subject to gift tax. But petitioner's argument ignores the clarification of *Estate of Sanford* in *Smith* v. *Shaughnessy*, 318 U.S. 176, 179 (1943), where this Court stated: "Congress plainly pointed out that 'some' of the 'total gifts subject to gift taxes . . . may be included for estate tax purposes and some not,' " quoting H. R. Rep. No. 708, *supra*, at 45. As the Tax Court succinctly stated in its order denying petitioner's "Motion for Reconsideration of Findings and Opinion" (Pet. App. A23):

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[6]*Estate of Sanford* involved the question whether there was a completed gift when the donor reserved certain powers to change the disposition of the property.

> * * * the gift tax clearly applies to the gratuitous transfer of valuable property rights notwithstanding the fact that such rights, like a simple life estate, might under certain circumstances terminate on or before the death of a donor and therefore escape inclusion in the gross estate.

4. Although we believe that the decision below is correct, we agree with petitioner that it conflicts with that of the Eighth Circuit in *Keinath* v. *Commissioner*, *supra*, 480 F.2d 57. Moreover, we are advised by the Internal Revenue Service that the question presented is of considerable administrative importance. There are 13 other cases involving the same question now pending administratively or in litigation, with approximately $10.7 million in revenue at stake. Apart from the court below and the Eighth Circuit, appeals in these cases would also lie in four additional circuits that have not spoken on the question. The conflict of decisions is therefore expected to persist.

On the other hand, the continuing importance of the question has been somewhat diminished by the enactment of Section 2518 of the Code in Section 2009(b)(1) of the Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1893. This new provision contains a nine-month rule for the disclaimer of any interest created after December 31, 1976. However, for any interest created prior to 1977, the "reasonable time" rule contained in Section 25.2511–1(c), as interpreted in *Keinath* and the instant case, will continue to apply. For this reason, it is expected that gift tax controversies between disclaimants and the Internal Revenue Service with respect to interests created prior to 1977 will be litigated for a substantial future period. Accordingly, despite the enactment of Section 2518, we do not oppose the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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